

**APPENDIX F**

**Memorandum of Agreement**

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**FINAL**

**MEMORANDUM OF AGREEMENT**

**Between**

**[Individual Signatory Tribe]**

**and**

**The Surface Transportation Board**

**and**

**The Dakota, Eastern & Minnesota Railroad Company**

**Regarding**

**The Environmental Impact Statement**

**For**

**THE POWDER RIVER BASIN EXPANSION PROJECT**

## INTRODUCTION

This Memorandum of Agreement (MOA) has been developed at the request of and with the assistance of representatives of consulting tribes and Indian organizations. The intent of this MOA is to ensure tribal participation under the NEPA process in certain specific areas of particular concern to tribes, and sets forth in writing the commitment of the DM&E Railroad and the STB to address issues of concern that were raised by tribal representatives during consultation. This MOA is to be made part of the Environmental Impact Statement (EIS) for this project under the National Environmental Policy Act (NEPA) process. This document does not restrict tribal interest or involvement in any other areas addressed by the NEPA process in the EIS.

Consultation with tribes and tribal organizations identified as potentially affected by this project commenced in February of 1999. 34 federally recognized tribes and 4 Indian Organizations were contacted by letter and telephone and individual meetings, as requested, were held throughout the spring and summer of 1999 to provide information and discuss issues of concern to Indian people and how they would be addressed in the EIS process. To date 13 Tribes and 4 Indian Organizations continue to be actively involved in the process. Attachment 1 provides an overview of these consultation efforts.

An inter-tribal consultation meeting was held in May of 1999 in Williston, ND to review a draft Programmatic Agreement (PA) addressing Section 106 of the National Historic Preservation Act. The tribes in attendance at this meeting felt there were a variety of issues of concern to Indian people and Tribes and requested that an MOA be developed and included in the EIS which would be an umbrella document that would address concerns that could not be covered in the PA. A rough draft MOA was written at this time, a working group was selected to work on the content, and a second working group was selected to assist in providing input on the draft PA. A second meeting later in the summer was agreed upon.

The second inter-tribal meeting was held in Rapid City in July of 1999 to review both revised drafts of the MOA and the PA. At the close of this meeting it was decided that more work on the documents by the working groups was needed and that drafts would then be reviewed/circulated. The final drafts of these documents would be sent out to Tribes, Indian Organizations and Federal Agencies for comment.

A final draft of the MOA was sent out for comment in January of 2000. At a consultation meeting in February of 2000, to review the South Dakota archeological findings (as agreed in the draft MOA and draft PA) discussion of the draft MOA resulted in the request for an Introduction to the MOA which would explain what its purpose was and how it was created.

The following tribes and tribal organizations were in attendance at one or more of the inter-tribal meetings: Rosebud Sioux, No. Cheyenne, Ft. Peck Tribes, Lower Brule Sioux, Three Affiliated Tribes, Standing Rock Sioux, Crow Creek Sioux, Santee Sioux, Oglala Sioux, Cheyenne River Sioux, Yankton Sioux, Upper Sioux Community, the Kiowa Tribe, Medicine Wheel Coalition, Gray Eagle Society, Minnesota Indian Affairs Council and the Black Hills Sioux Nation Treaty Council. The federal agencies present at one or more of these meetings include: the Army Corps of Engineers (Omaha), the Forest Service, the Surface Transportation Board and the Advisory Council on Historic Preservation (DC and Denver).

The DM&E Railroad was also present at these meetings.

WHEREAS, the Surface Transportation Board (STB), the lead Federal agency, has received an application for the construction and operation of a rail line by the Dakota, Minnesota and Eastern Railroad Corporation (DM&E), extending its existing system into the Powder River Basin of Wyoming as defined in its decision of December 10, 1998; and,

WHEREAS, the STB has determined that the proposed project is an undertaking and may have an effect upon natural and cultural resources of American Indian people and pursuant to the National Environmental Policy Act (NEPA) is conducting an Environmental Impact Statement (EIS) with United States Forest Service Region 2 (USFS), the United States Department of the Interior - Bureau of Land Management Montana State Office and United States Department of the Interior - Bureau of Land Management Wyoming State Office (collectively referred to as BLM), the United States Army Corps of Engineers Omaha District and United States Army Corps of Engineers St. Paul District (collectively referred to as COE), the United States Department of Interior - Bureau of Reclamation (BOR), and the United States Coast Guard (USCG), as cooperating agencies. All of the above are signatories to this Agreement (Signatories); and,

WHEREAS, the STB is in consultation with the Cheyenne and Arapaho Tribes of Oklahoma, Cheyenne River Sioux Tribe, Comanche Nation of Oklahoma, Crow Tribe, Crow Creek Sioux Tribe, Eastern Shoshone Tribe, Flandreau Santee Sioux Tribe, Fort Peck Tribes, Ho-Chunk Nation, Kiowa Tribe, Lower Brule Sioux Tribe, Lower Sioux Community, Menominee Indian Tribe, Northern Arapaho Tribe, Northern Cheyenne Tribe, Oglala Sioux Tribe, Omaha Tribe, Pawnee Nation of Oklahoma, Ponca Tribe, Prairie Island Sioux Community, Rosebud Sioux Tribe, Sac & Fox Nation, Santee Sioux Tribe, Shakopee Mdewakanton Sioux, Sisseton-Wahpeton Sioux Tribe, Spirit Lake Tribe, Standing Rock Sioux Tribe, Three Affiliated Tribes, Turtle Mountain Band of Chippewa Tribe, Upper Sioux Community, West River Cheyenne, Winnebago Tribe, Yankton Sioux Tribe (collectively referred to as Signatory Tribes). All of the above may be signatories to this Agreement. Signatories to this Agreement will be the duly recognized Chairman or authorized representative by Tribal Resolution; and,

WHEREAS, the Medicine Wheel Coalition for Sacred Sites of North America, the Minnesota Indian Affairs Council, The Medicine Wheel Alliance and the Gray Eagle Society and the Black Hills Sioux Nation Council (collectively referred to as Indian Organizations) are also invited to be signatories to this Agreement; and,

WHEREAS, the United States Government has a trust relationship with American Indian Tribes, as evidenced by Treaty and in provisions in numerous laws including, but not limited to the National Historic Preservation Act of 1966 (NHPA), the American Indian Religious Freedom Act (AIRFA), the Native American Graves Protection and Repatriation Act (NAGPRA), the National Park Service Bulletin 38, the Archaeological Resources Protection Act (ARPA) and [reaffirmed in] President Clinton's Memorandum for Heads of Executive Departments and Agencies of April 1994, Executive Order 13175 on Government to Government Consultation, Executive Order 13007 on Indian Sacred Sites. The Federal Agencies and DM&E recognize the need to consult, to the greatest extent practicable and to the extent permitted by law, with the signatory tribal governments prior to taking actions that affect these native governments or their members; and,

WHEREAS the Federal Agencies and DM&E, in consideration of the trust responsibilities between the U.S. Government and American Indian Tribes, are committed to supporting the

policy of Public Law 95-341 (the American Indian Religious Freedom Act of 1978), which states that "...it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites"; and,

WHEREAS the Signatory Tribes recognize that cultural and natural resources, and traditional cultural properties potentially affected by this project are invaluable in the preservation of endangered tribal resources critical to the preservation of their cultural heritage and the pursuit of traditional lifeways for present and future generations; and,

WHEREAS, the DM&E Railroad has proposed a rail line to transport coal from the Powder River Basin Coal fields in Wyoming to Winona, MN, transecting aboriginal tribal homelands identified on the map in the US Indian Claims Commission Final Report, 1978. (Attachment 1) These boundaries indicated on this map represent the results of cases before the US Indian Claims Commission of the US Court of Claims, in which American Indian Tribes proved aboriginal occupancy of a tract within the continental United States; and

WHEREAS, to promote and support government-to-government relationships with federally recognized sovereign nations as defined and required by the President's Executive Memorandum of April 1994, and Executive Orders 13007 and 13175, the Federal Agencies, are undertaking, through consultation, to work in partnership with the Signatory Tribes and concurring Indian Organizations to address and find solutions for the issues of concern on the Powder River Basin Expansion Project; and,

WHEREAS, the DM&E wishes to cooperate with the Federal Agencies who desire to fulfill their responsibilities to establish and maintain relationships with federally recognized sovereign nations for the purpose of building stable, long-term working relationships which result in positive, mutually understood and beneficial solutions to common situations; and,

WHEREAS, this MOA reflects the agreements of a formalized consultation process begun by the Federal Agencies and DM&E in January 1999, with the Signatory Tribes and concurring Indian Organizations in addressing the proposed Powder River Basin Expansion Project; and,

WHEREAS, the Federal Agencies and DM&E are committed to addressing concerns identified by signatory tribal governments regarding natural and cultural resource issues and other socio economic issues within their areas of responsibility, and to outline steps necessary and desired in resolving issues;

NOW THEREFORE, be it resolved that the Federal Agencies, the DM&E, and the signatory Tribes, and the concurring Tribal Organization (the Signatory Parties) agree that, to ensure the meaningful participation of the Signatory Tribes and concurring Tribal Organizations, the following stipulations/conditions be agreed upon:

## **STIPULATIONS/(CONDITIONS)**

1. The provisions of this MOA that expressly address the rights, duties and obligations of and to Signatory Tribes shall not be binding upon nor enforceable by an entity not a Party to this Agreement.
2. It is mutually advantageous for all signatory and concurring parties to cooperate in this opportunity to increase the knowledge and understanding of the historical significance of the American Indian people, and their resources.
3. Nothing in this agreement shall prohibit or discourage agreements being made by and between the DM&E Railroad and individual Signatory Tribes.
4. This MOA will be made part of the Environmental Impact Statement (EIS), currently being prepared by the Federal Agencies.
5. The Signatory Tribes will be provided an invitation to fully participate in the development of the Programmatic Agreement (PA) being developed under the National Historic Preservation Act (NHPA), Section 106 and 110.
6. The signatory Tribes will be participants in the Identification, Planning and Treatment of other cultural areas (to include but not be limited to) Traditional Cultural Properties (TCPs), and Sacred Sites using the procedures and process agreed upon in the PA, as identified in the treatment plan.
7. NAGPRA regulations and procedures under federal, state and local laws will be identified and defined, and to the extent possible a unified process will be defined within the PA and the Identification Plan and Treatment Plan being developed for this project.
8. In the event DM&E obtains authority to construct a rail line, the Monitoring Program in use during the archeological survey work will be expanded to include a training component. This program will be utilized and implemented during all phases of the project (to include archeological work) and specifically in the event construction should occur if the project is approved. This plan should include opportunity for all Signatory Tribes to identify potential and qualified monitors, and to participate in the training of monitors in a uniform process for conducting the monitoring and relevant statutory compliance issues.
9. In the event DM&E obtains authority to construct a rail line, the Signatory Tribes and concurring Indian Organizations will have the opportunity to participate in a timely manner, the procedure and process of the development of any studies that may be performed of plants/ethnobotany, animals/aquatic plants and animals of the area of the proposed route.
10. In the event DM&E obtains authority to construct a rail line, the Parties will work together in the development of an ethno-historic record/report of the proposed rail road corridor.
11. The Signatory Tribes will participate in an examination of intellectual property rights in the control of data, in the confidentiality of information [on cultural areas] as determined

by numbers 2, 3, 6 and 7 above, and any writing incorporating intellectual properties contributed by Native Americans in the course of this project.

12. The Endangered Species Act will be complied with.
13. The DM&E and the Signatory Tribes will work together to develop an active recruitment and training program for the employment of Indian people of the Signatory Tribes outside the monitoring program in carrying out construction activities in the building of the railroad in the event the appropriate agencies permit a route to be constructed. In the event DM&E obtains authority to construct a rail line, the DM&E will identify and recruit qualified personnel from the Signatory Tribes for long term employment and contract opportunities for qualified American Indian contractors.
14. In the event DM&E obtains authority to construct a rail line, the terms of this MOA will be rolled over into a Management Plan to ensure compliance with this MOA.
15. The Management Plan will include a notification procedure developed by the DM&E and Signatory Tribes. This procedure will ensure notification of Signatory Tribes in the event of unanticipated discoveries of human remains or artifacts during the life of the railroad.
16. The Signatory Tribes will establish a tribal mediation component (group, task force) for consensus building. This component would be included in the Management Plan and would provide oversight (both short and long term), and would be a long-term on-going liaison between the tribes and the project, responsible for inter-tribal conflict resolution and internal tribal disagreements as they pertain to the project.
17. Should a dispute or objection arise between the Signatory Parties regarding any aspect of this MOA, the parties agree to consult with each other in good faith to resolve the dispute or objection. If the dispute or objection cannot be resolved, the disputing parties agree to meet with a mutually acceptable mediator to attempt to resolve the dispute. All parties agree not to seek judicial relief to resolve the dispute or objection, or to otherwise sue to enforce this MOA, until the consultation and mediation attempts have been exhausted.
18. Amendments, supplements or revisions to this MOA may be proposed by any party to this agreement and shall become effective upon formal approval as set forth in 18.
19. The Signatory Parties recognize the logistical difficulty in obtaining simultaneous signatures to this MOA. Therefore, the Signatory Parties agree that this MOA will take effect upon the signature of the Federal agencies, the DM&E and any Signatory Tribes, but its provisions will not affect any party, until and unless that party signs the MOA on or before November 1, 2001.



## FEDERAL AGENCIES

_____ The Surface Transportation Board	_____ Date
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_____ The U.S. Army Corps of Engineers, Omaha District	_____ Date
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_____ The U.S. Army Corps of Engineers, St. Paul District	_____ Date
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_____ The U.S.D.A. Forest Service Region 2	_____ Date
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_____ The U.S.D.I. Bureau of Land Management Montana State Office	_____ Date
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_____ The U.S.D.I. Bureau of Land Management Wyoming State Office	_____ Date
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_____ The U.S.D.I. Bureau of Reclamation	_____ Date
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_____ The U.S. Coast Guard	_____ Date
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## APPLICANT

_____ President, Dakota, Minnesota & Eastern Railroad Corporation	_____ Date
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## SIGNATORY TRIBES

_____ Chairman, Northern Arapaho Tribe	_____ Date
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_____ Chairman, Eastern Shoshone Tribe	_____ Date
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_____ Chairman, Northern Cheyenne Tribe	_____ Date
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_____ Chairman, Ft. Peck Tribes	_____ Date
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_____ Chairman, Crow Tribe	_____ Date
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Chairman, Oglala Sioux Tribe

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Date

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Chairman, Rosebud Sioux Tribe

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Chairman, Standing Rock Sioux Tribe

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Chairman, Spirit Lake

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Date

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Chairman, Turtle Mountain Band of Chippewa

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Chairman, Three Affiliated Tribes

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Chairman, Santee Sioux Tribe

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Chairman, Omaha Nation

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Chairman, Winnebago Tribe

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Chairman, Ponca Tribe

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Chairman, Upper Sioux Community

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Chairman, Lower Sioux Community

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Chairman, Prairie Island Sioux Community

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Chairman, Shakopee Mdewakanton Sioux

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Chairman, Kiowa Nation

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Chairman, Comanche Nation

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Chairman, Cheyenne-Arapaho Tribes of Oklahoma

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Chairman, Pawnee Nation

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Chairman, Sac & Fox Nation of Oklahoma

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Chairman, Sac & Fox Nation in Iowa

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Chairman, Menominee Indian Tribe

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Chairman, Ho-Chunk Nation

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Chairman, Cheyenne River Sioux

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Chairman, Crow Creek Sioux

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Chairman, Yankton Sioux

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Chairman, Lower Brule Sioux

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Chairman, Sisseton-Wahpeton Sioux

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Chairman, Flandreau Santee Sioux

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### CONCURRING PARTIES

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President, Medicine Wheel Alliance

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Date

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President, Medicine Wheel Coalition for Sacred Sites

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Chairman, Minnesota Indian Affairs Council

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President, Gray Eagle Society

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President, Black Hills Sioux Nation Council

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Date

## **GLOSSARY OF TERMS/ACRONYMS**

<b>Concurring Party</b>	Those Indian Organizations concurring with the MOA.
<b>Cultural Resource</b>	A cultural resource is any prehistoric or historic district, site, building, structure or object in American history, architecture, engineering, archeology, or culture. This term includes artifacts, records, and remains that are related to and located within such properties. The term also includes properties of traditional religious and cultural importance to an Indian Tribe that may meet the National Register criteria, or criteria as defined in National Park Service Bulletin 38, and in Executive Order 13007 on Indian Sacred Sites.
<b>Federal Agencies</b>	Any Federal entity with a statutory obligation to fulfill the requirements of NEPA, NHPA and Executive Orders 13084 on Government to Government Consultation and 13007 on Indian Sacred Sites
<b>Ground Disturbance Area</b>	The [surface] area that will be impacted by construction
<b>Human Remains</b>	The physical remains of a human body.
<b>Identification Plan</b>	A proposal for the identification of properties eligible for inclusion to the National Register of Historic Places under Section 106 of the National Historic Preservation Act.
<b>Monitoring Program</b>	A program developed to ensure the presence of a Native American during archeological exploration and construction activities.
<b>MOA</b>	Memorandum of Agreement
<b>NAGPRA</b>	Native American Graves Protection and Repatriation Act
<b>NEPA</b>	National Environmental Policy Act
<b>NHPA</b>	National Historic Preservation Act
<b>P A</b>	Programmatic Agreement as defined by Section 106 of the National Historic Preservation Act.
<b>STB</b>	Surface Transportation Board
<b>Signatory Tribe</b>	Federally recognized tribes who are signatories to the MOA.
<b>TCP</b>	Traditional Cultural Property as defined in NPS Bulletin No. 38.

**THPO**

Tribal Historic Preservation Officer appointed or designated in accordance with the Act is the official representative of an Indian tribe for the purposes of Section 106.

**Treatment Plan**

A proposal for the mitigation of effects upon any historic property that a project would effect. It can include data recovery, documentation, restoration or other measures.

**Unassociated funerary objects**

Those funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or Federal agency.

**Undertaking**

An undertaking is a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit; license or approval; and those subject to state or local regulation administered pursuant to a delegation or approval by a Federal agency.

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